

Laura M. Reckart -- **Response to Defendant's Motion to Inform the Jury of the Potential Sentencing Range** – Jury does not decide punishment and thus it is inappropriate to inform jury about potential punishment.

The State of Arizona, by and through undersigned counsel, objects to the defendant's motion to inform the jury of the potential sentencing range the defendant faces if convicted, based on the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

The defendant is charged with the serious crimes of one count of Sexual Conduct with a Minor, a Class 2 Felony and Dangerous Crime Against Children; one count of Molestation of a Child, a Class 2 Felony and Dangerous Crime Against Children; one count of Sexual Abuse, a Class 3 Felony and Dangerous Crime Against Children; and one count of Sexual Assault, a Class 2 Felony. The charges arose out of the defendant's conduct against two underage girls between July 1 and August 18, 1997. During that time period, the defendant had sexual intercourse with both victims. One girl was 14 years old; the other girl was 15. The defendant, who was 24, knew the ages of both victims. One of the victims caught a sexually transmitted disease from the defendant, who confessed to having sexual intercourse with her.

ARGUMENT:

"In Arizona, the trial court, not the jury determines matters of punishment." *State v. Allie*, 147 Ariz. 320, 326, 710 P.2d 430, 436 (1985). Juries are not to consider the consequences of their verdicts, and information regarding the consequences of a verdict is irrelevant to the jury's task. *State v. Cornell*, 179 Ariz. 314, 327, 878 P.2d 1352, 1365 (1994) (citing and quoting from *Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2419, 2421, 129 L.Ed.2d 459 (1994)); *State v. Nieto*, 186 Ariz. 449, 458, 924 P.2d 453, 462 (App. 1996).

In Arizona, the jury makes findings of fact and the judge makes rulings of law. A defendant is entitled to a verdict of a jury based upon the evidence, without consideration of the punishment inflicted. *State v. Van Dyke*, 127 Ariz. 335, 336, 621 P.2d 22, 24 (1980); *State v. Burnetts*, 80 Ariz. 208, 212, 295 P.2d 377, 379 (1956). As the United States Supreme Court stated in *Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2419, 2424, 129 L.Ed.2d 459 (1994):

It is well established that when a jury has no sentencing function, it should be admonished to “reach its verdict without regard to what sentence might be imposed.” *Rogers v. United States*, 422 U.S. 35, 40, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975). The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion. See *Pope v. United States*, 298 F.2d 507, 508 (C.A. 5 1962); cf. *Rogers, supra*, 422 U.S., at 40, 95 S.Ct., at 2095.

[Footnotes omitted.]

In Arizona, the trial judge performs the sentencing function, not the jury. The jury, as the trier of fact, considers the evidence presented during the trial, deliberates thereon and determines the factual issues raised by the case. In reaching its verdict the jury should not be concerned with the possible sentences that the trial judge could impose, and questions of punishment should not affect the jury's deliberations and determination of guilt or innocence. See *State v. Koch*, 138 Ariz. 99, 673 P.2d 297 (1983); *State v. Burnetts*, 80 Ariz. 208, 295 P.2d 377 (1956). In *State v. Tims*, 143 Ariz. 196, 693 P.2d 333 (1985), the Arizona Supreme Court reaffirmed its holding in *Koch, supra*:

This court, in *State v. Koch*, 138 Ariz. 99, 673 P.2d 297 (1983), has already determined that jury instructions should not state the potential punishment that may result from the jury's verdict:

“In a criminal trial in Arizona, the exclusive function of the jury is to determine whether the defendant is guilty or not guilty. The trial court determines matters of punishment. ‘A defendant is entitled to a fair trial and to a verdict of a jury upon the evidence without consideration of the punishment inflicted.’ *State v. Burnetts*, 80 Ariz. 208, 212, 295 P.2d 377, 379 (1956). See *State v. Van Dyke*, 127 Ariz. 335, 621 P.2d 22 (1980). Consequently, a trial court's jury instructions generally should not touch on the subject of punishment except to advise the jury not to consider it.”

138 Ariz. at 105, 637 P.2d at 303. In *State v. Corrales*, 138 Ariz. 583, 676 P.2d 615 (1984) the trial court during the process of selecting the jury advised the jury panel that the death penalty was not applicable in that case. A murder conviction under A.R.S. § 13-1105 mandates a penalty of life imprisonment without the possibility of parole for 25 years. The Supreme Court citing *Koch* stated that “because punishment is no longer a jury question in first degree murder cases, such instructions should no longer be given.” *State v. Corrales*, 138 Ariz. at 596, 676 P.2d at 628. Accordingly, it would have been improper for the trial judge to allow defense counsel to inform the jury on the mandatory punishment under A.R.S. § 13-1206 to consider along with the evidence presented at trial in determining guilt.

State v. Tims, 143 Ariz. 196, 198, 693 P.2d 333, 335 (1985) [footnotes omitted]. This principle is again emphasized in *State v. Nieto*, 186 Ariz. 449, 458, 924 P.2d 453, 462 (1996):

“In Arizona, the trial court, not the jury determines matters of punishment.” *State v. Allie*, 147 Ariz. 320, 326, 710 P.2d 430, 436 (1985). [J]uries are not to consider the consequences of their verdicts ... and “[i]nformation regarding the consequences of a verdict is irrelevant to the jury's task.” *State v. Cornell*, 179 Ariz. 314, 327, 878 P.2d 1352, 1365 (1994) (*quoting Shannon v. United States*, 512 U.S. 573, ---, 114 S.Ct. 2419, 2421, 129 L.Ed.2d 459 (1994)). Instructing the jury that they are not to be concerned with sentencing consequences is not error “[w]here

an instruction merely advises the jury not to consider the possible punishment and neither directly nor indirectly suggests that defendant, if convicted, would be treated with leniency” *Allie*, 147 Ariz. at 326, 710 P.2d at 436.

Just as Arizona law prohibits any reference during trial to the defendant’s prior offenses or to aggravating matters usually addressed by the judge at sentencing, Arizona law also prohibits telling the jury about potential sentencing ranges:

Although jurors may be influenced by the punishment that might be meted out as a result of their verdict, decisions in Arizona have long held that such matters are “none of their concern.” *State v. Burnetts*, 80 Ariz. at 212, 295 P.2d at 379. To allow the jury to consider the possible punishment would be to allow them to base their decision on sympathy, passion or prejudice. Such a basis for a verdict would clearly be improper. See *State v. Tims*, 143 Ariz. 196, 198, 693 P.2d 333 (1985).

State v. Olsen, 157 Ariz. 603, 608, 760 P.2d 603, 608 (App. 1988).

Until the Supreme Court says otherwise, the jury is not allowed to know of potential sentencing ranges faced by the defendant. The State asks this Court to deny the defendant’s motion and order the defense not to mention anything to the jury about the potential punishment the defendant faces if he is convicted.